MOTION FILED
JAN 11 1999

No. 98-947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and
MCCAW CELLULAR COMMUNICATIONS, INC.,
Petitioners,
v.
CORYELLE TENORE, CHARLES F. PETERSON and
KAREN M. COLE, on behalf of themselves
and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

HOWARD J. SYMONS *
WILLIAM A. DAVIS
ELIZABETH H. VALINOTI
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 434-7300

MICHAEL F. ALTSCHUL
CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

* *Counsel of Record*
Counsel for Amicus Curiae

January 11, 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-947

AT&T WIRELESS SERVICES and
McCAW CELLULAR COMMUNICATIONS, INC.,
Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and
KAREN M. COLE, on behalf of themselves
and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Cellular Telecommunications Industry Association ("CTIA") hereby moves, pursuant to Rule 37 of this Court, for leave to file the attached brief amicus curiae in support of Petitioners. Petitioners have given their consent. Respondents, despite numerous inquiries, have not stated whether they consent.

CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership covers all commercial mobile radio service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more PCS carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the pending petition for writ of certiorari.

As explained more fully in the accompanying brief, the resolution of this case is of great significance to amicus and its members. If left uncorrected, the decision of the Washington Supreme Court will impede the growth of the wireless industry and substantially harm wireless service providers. This is so because the decision effectively permits a state—whether by legislative action or by the judicial award of rate rebates—to regulate the rates charged by wireless carriers operating in that individual state. Congress specifically acted to preempt state regulation of wireless rates because it recognized that state rate regulation was inappropriate for an industry that operates without regard to state lines. CTIA believes that its brief will provide the Court with relevant information and argument not already brought to the Court's attention by the parties, particularly with respect to the broad significance of the question presented, and the proper construction of federal legislation preempting states from regulating wireless carriers' rates.

Respectfully submitted,

HOWARD J. SYMONS *
WILLIAM A. DAVIS
ELIZABETH H. VALINOTI
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 434-7300

MICHAEL F. ALTSCHUL
CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

* *Counsel of Record*

Counsel for Amicus Curiae

January 11, 1999

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
REASONS FOR GRANTING THE PETITION	2
I. STATES ARE FORBIDDEN FROM ENGAGING IN RATE REGULATION OF WIRELESS TELECOMMUNICATIONS CARRIERS	4
A. Federal Law Prohibits States From Regulating Wireless Carriers	4
B. The Washington Supreme Court Decision Incorrectly Allows State Regulation of Wireless Carriers' Rates	8
II. CONSUMERS OF WIRELESS SERVICES HAVE A FEDERAL FORUM TO REDRESS THEIR GRIEVANCES	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

AT&T Co. v. Central Office Tel., Inc., 118 S. Ct. 1956 (1998) 8, 9
In Re Long Distance Telecommunications Litigation, 831 F.2d 627 (6th Cir. 1987) 12
Lee v. Contel Cellular of the South, 1996 Dist. LEXIS 19636 (Nov. 21, 1996) 13
Nat'l Communications Ass'n, Inc. v. AT&T, 46 F.3d 220 (2d Cir. 1995) 12
PACE Membership Warehouse, Inc. v. US Sprint Communications Co. Ltd. Partnership, 1991 U.S. Dist. LEXIS 19788 (D. Colo. February 8, 1991) 12
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10
Time Warner Cable v. Doyle, 66 F.3d 867 (7th Cir. 1995) 9

STATUTES

47 U.S.C. § 152(b) (1994) 11
47 U.S.C. § 201 (1994) 12
47 U.S.C. § 201(b) 1994 12
47 U.S.C. § 202 (1994) 12
47 U.S.C. § 207 (1994) 12
47 U.S.C. § 208 (1994) 12
47 U.S.C. § 209 (1994) 12
47 U.S.C. § 332(c)(1) (1994) 11
47 U.S.C. § 332(c)(3)(A) (1994) 4, 6
47 U.S.C. § 543 (1994) 9
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 6002(b), 107 Stat. 312 4

LEGISLATIVE MATERIALS

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 ..... 2, 4
H.R. Rep. No. 103-213 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378 4

TABLE OF AUTHORITIES—Continued

FCC DECISIONS	Page
Report and Order and Order On Reconsideration, *Petition of Arizona Corporation Commission to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 10 F.C.C.R. 7824 (1995)	6
Report and Order, *Petition of New York State Public Service Commission To Extend Rate Regulation*, 10 F.C.C.R. 8187 (1995)	6
Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 F.C.C.R. 7025, *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996)	5, 6
Order on Reconsideration, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 11 F.C.C.R. 796 (1995)	6
Report and Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486 (1995)	5, 6, 7, 11, 13
Report and Order, *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (1995)	6
Report and Order, *Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana*, 10 F.C.C.R. 7898 (1995)	6

TABLE OF AUTHORITIES—Continued

Page

Report and Order, *Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 F.C.C.R. 7872 (1995) 6

Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411 (1994) 5, 6, 11

ADDITIONAL FCC MATERIALS

First Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 F.C.C.R. 8844 (1995) 9

Notice of Proposed Rulemaking, *In the Matter of Truth-in-Billing and Billing Format*, 13 F.C.C.R. 18176 (1998) 13

Third Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 13 F.C.C.R. 19746 (1998) 5, 6

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990) 8

Comments of the Federal Trade Commission, *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170 (Nov. 13, 1998) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-947

AT&T WIRELESS SERVICES and
McCAW CELLULAR COMMUNICATIONS, INC.,
Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and
KAREN M. COLE, on behalf of themselves
and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

---

BRIEF AMICUS CURIAE OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Cellular Telecommunications Industry Association ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers.[1] Membership covers all commercial mobile radio service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers.

---

[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than amicus curiae and its members made any monetary contribution to the preparation or submission of this brief.

CTIA represents more PCS carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the pending petition for writ of certiorari.

If left uncorrected, the decision of the Washington Supreme Court will impede the growth of the wireless industry and substantially harm wireless service providers. This is so because the decision effectively permits a state—whether by legislative action or by the judicial award of rate rebates—to regulate the rates charged by wireless carriers operating in that individual state. Congress specifically acted to preempt state regulation of wireless rates because it recognized that state rate regulation was inappropriate for an industry that operates without regard to state lines.

The decision of the Washington Supreme Court is wrong as a matter of federal telecommunications law. If left uncorrected, the decision will substantially harm the wireless industry by creating the balkanization that Congress sought to prevent. This Court should grant the petition for writ of certiorari and reverse the decision of the Washington Supreme Court.

REASONS FOR GRANTING THE PETITION

Wireless telecommunications carriers are an "integral part of the national telecommunications infrastructure" that, "by their nature, operate without regard to state lines." H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. Given the inherently interstate nature of wireless services and their importance to the economy, Congress recognized that state-by-state rate regulation would inhibit the industry's growth, and ultimately harm consumers.

While Congress preempted state regulation of wireless rates, it permitted states to regulate "the other terms and conditions" of wireless services. Plaintiffs in this case

sought to circumvent federal preemption of their causes of action by crafting their state civil action as a dispute regarding the disclosure of a wireless rate, rather than a dispute concerning the rate itself. Plaintiffs' clever wording of their causes of action does not obviate the fact that, at the end of the day, the gravamen of the dispute is whether these plaintiffs were overcharged and, if so, the amount of rate rebate that they are entitled to receive.

Avoiding this sort of state-by-state regulation of the wireless industry is critical to the industry's continued success and the continued application of federal law in the manner Congress intended. The successful history of the wireless industry is a testament to the principle that vigorous free market competition, rather than burdensome and conflicting state regulation, is the best way to ensure continued industry growth, improvements in technology, decreasing prices, and improved customer service. Vigorous free market competition does not mean that customers who are treated unfairly or illegally are left with no remedy, however. On the contrary, the same federal statutory scheme that prohibits state rate regulation authorizes the Federal Communications Commission ("FCC" or "Commission") and the federal government to resolve industry-customer rate and billing disputes.

This Court should grant the petition and reverse the decision of the Washington Supreme Court in order to preserve the important Congressional directive of federal preemption of state rate regulation of wireless services; avoid the balkanization of this critical and fast growing industry; and ensure an appropriate remedy for mistreated customers.

I. STATES ARE FORBIDDEN FROM ENGAGING IN RATE REGULATION OF WIRELESS TELECOMMUNICATIONS CARRIERS

A. Federal Law Prohibits States From Regulating Wireless Carriers

In 1993, Congress amended the Communications Act of 1934 ("Communications Act") to ensure that the federal government, rather than the states, would maintain sole authority to oversee the rates charged by the fast-growing wireless telecommunications industry. *See Omnibus Budget Reconciliation Act of 1993,* Pub. L. No. 103-66, 6002(b), 107 Stat. 312, 392-93 (codified in scattered sections of 47 U.S.C.). Congress accomplished this objective by preempting state regulation of the rates charged by wireless carriers:

> Notwithstanding section[] 2(b) [which otherwise gives states jurisdiction over intrastate rates] . . . ., no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service.

47 U.S.C. § 332(c)(3)(A) (1994).

The legislative history of section 332 clarifies Congress' understanding that a competitive wireless marketplace, guided by a uniform national policy and free from unnecessary state regulatory involvement, will ensure that customers enjoy reasonable rates and high quality services, while encouraging and maximizing investment in this capital intensive industry. *See* H.R. Rep. No. 103-213 at 480-81 (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 1169-70. ("Conference Report") (finding that "uniform national policy is necessary and in the public interest" to "promote competition for wireless services" and to avoid "State regulation [that might] be a barrier to the development of competition in this market"); H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (federal legislation deigned to encourage fur-

ther investment in wireless infratructure); Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut,* 10 F.C.C.R. 7025, 7031-32 (1995) (investment in wireless infrastructure will be maximized by "establishing a stable, predictable regulatory environment that facilitates prudent business planning"), *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* 9 F.C.C.R. 1411, 1421 (1994) ("*CMRS Second Report and Order*") (regulation of CMRS must be "perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communication services—rather than as a burden standing in the way of entrepreneurial opportunities"). Preemption of state rate regulation was deemed critical to the growth and development of the wireless industry because Congress sought to avoid conflicting, state-by-state ratemaking. *See* Report And Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates,* 10 F.C.C.R. 7486, 7499 (1995) ("*California Regulatory Authority Over Intrastate Cellular Service Rates*").

The recent history of the wireless industry confirms that competition has succeeded in meeting Congress' objectives. As recognized by the FCC, "competition in a number of segments of the CMRS industry has grown more than it has ever before. While this positive development is still in its early stages, the signs of competition are clear." Third Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconcilitation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* 13 F.C.C.R. 19746, 19749 (1998). Indeed, the wireless

industry has added more than 18 million new subscribers in each of the past three years, with total subscribership reaching 55 million by the end of 1997. *Id.* at 19751. Just as was envisioned by Congress in its 1993 revisions to the Communications Act, the wireless industry has succeeded by relying on robust, unfettered competition, rather than burdensome state rate regulation.

Notwithstanding the general rule that states must refrain from regulating wireless carriers' rates, states may, under certain limited and specified circumstances, petition the FCC to regulate wireless carriers' rates. 47 U.S.C. § 332(c)(3)(A) (1994).[2] States face a high burden of proof to obtain FCC authority to engage in regulation of wireless carriers' rates, however. *See CMRS Second Report and Order* at 1506 (finding that "such petitions must demonstrate both that market conditions . . . do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and a substantial portion of the CMRS subscribers . . . have no alternative means of obtaining basic telephone service").

The FCC has rejected all petitions by states that have sought authority to regulate wireless carriers' rates since the enactment of the 1993 amendments,[3] holding that the

---

[2] Section 332 provides that a State

> may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—(i) market conditions with respect to such services fail to protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

47 U.S.C. § 332(c)(3)(A) (1994).

[3] Report and Order, *Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State*

proponents of state rate regulation had not met the heavy burden imposed on those who would create exceptions to the national policy embodied in section 332(c). In its decision denying a petition filed by the State of California, for example, the Commission explained that section 332's burden of proof is critical because Congress sought "to establish a *national* regulatory policy for CMRS, not a policy that is balkanized state-by-state." Report and Order, *California Regulatory Authority Over Intrastate Cellular Service Rates* at 7499. *Id.* at 7513. The statute's high burden of proof, as well as the FCC's denial of all prior state petitions to engage in rate regulation, further demonstrate Congress' and the FCC's recognition of the importance of a national, rather than state-by-state, system of rate regulation for the wireless industry.

---

of Louisiana, 10 F.C.C.R. 7898 (1995); Report and Order and Order On Reconsideration, *Petition of Arizona Corporation Commsion, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 10 F.C.C.R. 7824 (1995); Report and Order, *Petition of New York State Public Service Commission To Extend Rate Regulation*, 10 F.C.C.R. 8187 (1995); Report and Order, *California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486 (1995), Order on Reconsideration, 11 F.C.C.R. 796 (1995) (denying California's reconsideration petition to regulate CMRS rates); Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 F.C.C.R. 7025 (1995), *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996); Report and Order, *Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 F.C.C.R. 7872 (1995); Report and Order, *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (1995).

B. The Washington Supreme Court Decision Incorrectly Allows State Regulation of Wireless Carriers' Rates

Pursuant to Section 332, states are prohibited from regulating wireless carriers' "rates," but are permitted to regulate "the other terms and conditions" of wireless services. Accordingly, in any case where preemption is at issue, the central inquiry is whether the state action at issue concerns "rates" or "other terms and conditions" of wireless services.

This Court has held that the term "rates," as used in section 332, must be defined broadly to ensure that states do not engage in backdoor ratemaking under the guise of regulating "other terms and conditions." *AT&T Co. v. Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998) (*"Central Office Tel."*). "Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." *Id.; see also Black's Law Dictionary* 1261 (6th ed. 1990) (defining "rate" as "a charge, valuation, payment or price fixed according to ration, scale or standard").

Plaintiffs argued successfully before the Washington Supreme Court that their allegation of rate overcharging was not preempted because it focused on the wireless provider's disclosure of its practice of "rounding-up," rather than upon the question whether a fully disclosed practice of rounding-up was lawful. This is a distinction without a difference. Most wireless rate disputes can be rephrased as disputes concerning "other terms and conditions." By focusing on Plaintiffs' characterization of their claims, rather than upon the gravamen of the claims themselves, the Washington Supreme Court failed to take into account the broad definition of the term "rates" and thereby un-

duly limited Congress' intent to preempt state-by-state rate regulation.

As this Court recognized in *Central Office Tel.*, billing rates do not exist in isolation. In order to have a meaning, a billing rate must, at a minimum, attach to a particular service and to a particular time increment. *See also* First Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,* 10 F.C.C.R. 8844, 8868 (1995) (the billing increment is an integral component of a wireless rate). A rate of ten cents, for example, has no meaning unless one knows that the rate refers to the use of local wireless services (the particular service) for one minute (the time increment). There are innumerable related issues concerning the definition of the particular service or time increment. Does the service include long distance? Are there additional charges such as land-line connection fees or roaming fees? Is air time billed in minutes, seconds, tenths of seconds, or hundredths of seconds? Does the billing clock begin to run when the receiving phone rings, when the call is answered, or at some other time? When does the clock stop running? By defining the term "rates" narrowly to include only the quoted dollar figure in isolation, the decision of the Washington Supreme Court effectively disregards *Central Office Tel.* and permits the narrow exception in section 332 permitting states to regulate "other terms and conditions" to overwhelm the general rule preempting all state regulation of wireless rates.[4]

---

[4] A somewhat similar issue of statutory construction was presented with respect to section 3 of the Cable Television Consumer Protection and Competition Act of 1992. 47 U.S.C. § 543 (1994). The United States Court of Appeals for the Seventh Circuit, interpreting legislation prohibiting "states from regulating cable rates," held that a state civil consumer protection action was preempted

In addition, while Plaintiffs contend that their causes of action are about inadequate disclosure, not rates, their Complaint seeks a rate rebate of all charges collected by Petitioners as a result of the alleged inadequate disclosure. App. 39a attached to Petitioner's Petition for Writ of Certiorari. Plaintiffs should not be permitted to escape the plain allegations in their own Complaint.

The fact that the Washington Supreme Court's decision concerns a request for a judicial award of a rate rebate as a remedy for alleged overcharging, rather than an act by the state legislature to regulate wireless rates or approve a rate rebate, also is a distinction without a difference. A state court order awarding a remedy of a rate rebate is the same for purposes of federal preemption analysis as is a state legislative act of rate regulation. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). The end results of the legislative and judicial cases are indistinguishable: In either instance, states—contrary to the letter and spirit of section 332—act as final arbiters of the rates paid by wireless carriers' customers.

The Washington Supreme Court also erred by declining to grant preemption based on the fact that wireless carriers are not required to file tariffs. *See* App. 31a attached to Petitioner's Petition for Writ of Certiorari. The fact that wireless carriers do not file tariffs is irrelevant to the issue whether states may engage in legislative or judicial rate-making. Section 332 prohibits the states from regulating

---

principally because "rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure." *Time Warner Cable v. Doyle*, 66 F.3d 867, 873, 882 (7th Cir. 1995).

"rates" irrespective of whether the wireless carrier has or is required to file a tariff. As was envisioned by Congress, *see* 47 U.S.C. § 332(c)(1) (1994), the FCC has refrained from requiring wireless carriers to file tariffs to promote the growth of a competitive wireless industry. In the *CMRS Second Report and Order,* the Commission specifically found that "[r]emoving or reducing regulatory requirements . . . tends to encourage market entry and lower costs [which results in] reasonable rates. Therefore, enforcement of [tariff filing requirements] is not necessary." *Second Report and Order* at 1478. It would be ironic and contrary to these goals if the absence of a tariff actually slowed growth and competition of the wireless industry by subjecting wireless carriers to inconsistent and burdensome state-by-state rate regulation.

II. CONSUMERS OF WIRELESS SERVICES HAVE A FEDERAL FORUM TO REDRESS THEIR GRIEVANCES

The fact that states do not have jurisdiction to resolve rate disputes between consumers and the wireless industry does not mean that consumers have no forum to redress their grievances. On the contrary, when Congress revised section 332 to preempt state rate regulation, it also amended section 2(b) of the Communications Act to give the FCC authority to address disputes concerning wireless rates. Thus, while section 2(b) generally deprives the Commission of authority over intrastate communications, Congress revised that section to except wireless carriers from this general limitation. 47 U.S.C. § 152(b) (1994) (establishing that the Commission lacks jurisdiction over intrastate communications "[*e*]*xcept as provided in . . . section 332*") (emphasis supplied). The end result is to give the FCC jurisdiction over rates for all wireless services.[5] Aggrieved wireless consumers may seek redress by,

---

[5] *But see* Report and Order, *California Regulatory Authority Over Intrastate Cellular Service Rates* at 7563 ("[W]e do not con-

among other things, filing a complaint with the FCC. 47 U.S.C. § 208 (1994). The Commission will review the complaint pursuant to the standards specified in sections 201 and 202 of the Act,[6] and may award damages to the injured consumer as appropriate. 47 U.S.C. § 209 (1994).[7] Moreover, Congress' decision to rely on the

---

sider it necessary at this time to address the contention that we have jurisdiction over intrastate rates for CMRS . . . The question . . . has been raised in petitions for reconsideration of the *CMRS Second Report and Order* and will be addressed some time in the future in the context of that proceeding."). The Commission has not yet addressed the petitions for reconsideration of the *CMRS Second Report and Order* that raised this issue. Nonetheless, the Commission has not ruled that it lacks jurisdiction over intrastate rates. Arguments to that effect are flatly contradicted by the express language of sections 2(b) and 332(c)(3).

[6] 47 U.S.C. §§ 201-202 (1994). Pursuant to section 201(b) of the Communications Act, the FCC has jurisdiction over carriers' "charges, practices, classifications, and regulations."

[7] Consumers also may seek redress in federal court for alleged rate violations by CMRS providers. *See* 47 U.S.C. § 207 (1994). Federal courts frequently refer cases brought under section 207 to the FCC pursuant to the Commission's primary jurisdiction over such matters. Under the doctrine of primary jurisdiction, a federal court will stay the judicial process pending referral to an administrative agency of issues that are within the agency's special expertise. *In Re Long Distance Telecommunications Litigation*, 831 F.2d 627, 632 (6th Cir. 1987). In determining whether to refer a case to an agency, a court will consider (1) whether the question at issue is within the standard experience of judges or involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Nat'l Communications Ass'n, Inc. v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995); *PACE Membership Warehouse, Inc. v. US Sprint Communications Co. Ltd. Partnership*, 1991 U.S. Dist. LEXIS 19788, at *4 (D. Colo. February 8, 1991). Accordingly, irrespective of whether the case is filed initially at the FCC or in federal district court, it likely will be decided by the FCC in the first instance.

Commission to impose this check comports with the uniform, national regulatory structure for CMRS reflected in section 332(c).

Federal regulatory jurisdiction presents the significant advantage of avoiding conflicting and inconsistent state decisions. As one federal court has noted, "[i]f state courts or even federal courts throughout the country were allowed to make individual case-by-case determinations on the appropriateness of 'rounding' air time usage rates there would be a substantial danger of inconsistent rulings and interference with the FCC's policy making as to competition." *Lee v. Contel Cellular of the South*, 1996 Dist. LEXIS 19636, *20 (Nov. 21, 1996). Because wireless carriers operate across state lines, the benefits of a national regulatory policy are particularly significant. *See* Report and Order, *State of California Regulatory Authority Over Intrastate Cellular Service Rates* at 7499 (Congress sought to "establish a *national* regulatory policy for [wireless communications], not a policy that is balkanized state-by-state").

Further confirmation of the FCC's authority to resolve disputes concerning wireless rates and billing is found in the Commission's recently-initiated "Truth-in-Billing" proceeding, which seeks comment on proposals enabling the agency to regulate telecommunications carriers' (including wireless carriers') billing practices. Notice of Proposed Rulemaking, *In the Matter of Truth-in-Billing and Billing Format*, 13 F.C.C.R. 18176, 18179 (1998). The FCC specifically asserted its belief that it has jurisdiction over telecommunications carriers' billing practices. *Id.* at 18182, 18183. In response to the FCC's NPRM, the Federal Trade Commission, among others, acknowledged that the FCC is the appropriate regulatory body to resolve consumer billing issues, and supported the FCC's assertion of jurisdiction in this area. Comments of the Federal Trade Commission, *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, p.1 (Nov. 13,

1998) (noting that, in some instances, the FCC and FTC had overlapping jurisdiction).

By upholding the Congressional directive preempting state rate regulation, the Court will ensure that wireless rates and billing practices remain matters of federal law and policy, consistent with Congressional directives.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

HOWARD J. SYMONS *
WILLIAM A. DAVIS
ELIZABETH H. VALINOTI
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 434-7300

MICHAEL F. ALTSCHUL
CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

* *Counsel of Record*

Counsel for Amicus Curiae

January 11, 1999